

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERMAN DOUGLAS, SR.,	:	CIVIL ACTION
	:	NO. 05-152
Plaintiff,	:	
	:	
v.	:	
	:	
WAL-MART STORES, INC. AND	:	
THEIR MANUFACTURER OF THE	:	
PRODUCTS AND ALL OTHER	:	
CO-INFRINGERS,	:	
	:	
Defendant.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

MARCH 10, 2005

I.

Plaintiff, Herman Douglas, Sr., filed this action pro se against Wal-Mart Stores, Inc. ("Wal-Mart"). Plaintiff alleges that Wal-Mart is infringing his patent. Specifically, plaintiff alleges that he has a patent on a u-shaped device that hooks on to an automobile operator's thigh, enabling the operator to steer the automobile with his or her thigh instead of, or in addition to, using his or her hands. Wal-Mart's allegedly infringing device is a u-shaped neck pillow that it currently sells. Wal-Mart denies that its neck pillow infringes plaintiff's patent and has filed a counterclaim seeking a declaratory judgment of non-infringement. Before the Court are plaintiff's Motion for Judgment by Default and Wal-Mart's Motion to Set Aside Entry of

Default. For the reasons that follow, plaintiff's motion will be denied, and Wal-Mart's will be granted.

II.

(A).

Plaintiff filed his complaint on January 13, 2005. Wal-Mart was served with the complaint on January 17, 2005 by certified mail, return receipt requested, which is a proper method of service under Federal Rule of Civil Procedure 4.¹ Wal-Mart failed to respond within twenty days, or by February 7, 2005, as required by Federal Rule of Civil Procedure 12.² On February 7, 2005, plaintiff filed a motion for a default judgment. Wal-Mart filed an answer on February 11, 2005. Wal-

¹ With respect to effectuating service by mail, Rules 4(h)(1) and 4(e)(1) provide that a corporation within a judicial district of the United States may be validly served "pursuant to the law of the state in which the district court is located." Fed. R. Civ. P. 4(h)(1); 4(e)(1). Pennsylvania Rules of Civil Procedure 403 and 404 govern the manner of service by mail upon an out-of-state corporation. To comply with Rules 403 and 404, "a copy of the process should be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent." Pa. R. Civ. P. 403, 404. Certified mail, return receipt requested, is a proper method of service on an out-of-state corporation under Pennsylvania law. See Pa. R. Civ. P. 405(c) ("Proof of service by mail under Rule 403 shall include a return receipt signed by the defendant"); Borah v. Monumental Life Ins. Co., No. Civ.A. 04-3617, 2005 WL 83261, at *2 (E.D. Pa. Jan. 14, 2005).

² Rule 12 provides, in relevant part, that "a defendant shall serve an answer . . . within 20 days after being served with the summons and complaint." Fed. R. Civ. P. 12.

Mart has since filed a motion to set aside the entry of default. It should be noted that Wal-Mart is in default, but the Clerk has not entered a default. Because Wal-Mart is in default, the Court will analyze the pending motions as though a default against Wal-Mart had been entered.

(B).

The Third Circuit has outlined the relevant principles for entry of a default and default judgment, and the lifting thereof:

In most instances where a party's right to prosecute or defend would be terminated as a sanction, the moving party has the burden of creating a record showing the appropriateness of this ultimate sanction and the district court has the responsibility of making a determination on that issue in light of considerations like those articulated in Poulis. When a defendant fails to appear and perhaps under other circumstances covered by Rule 55, the district court or its clerk is authorized to enter a default judgment based solely on the fact that the default has occurred. Even in those situations, however, consideration of Poulis type factors is required if a motion to lift the default is filed under Rule 55(c) or Rule 60(b) and a record is supplied that will permit such consideration.³

³ This Court has also outlined the relevant procedural principles for entry of default and of a default judgment as follows:

Unlike many state courts, the entry of a default judgment in federal court is generally a two-step process. See 10A Charles A. Wright, et al., Federal Practice and Procedure §§ 2682-84 (1998) (hereinafter "Federal Practice and Procedure"). Prior to obtaining a default judgment, default may be entered by the Clerk. Federal Practice and Procedure § 2682. The entry of default signifies that a

Anchorage Assocs. v. V.I. Bd. of Tax Rev., 922 F.2d 168, 177 (3d Cir. 1990) (referencing factors enumerated in Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863 (3d Cir. 1984): "1. The extent of the party's personal responsibility for failure to prosecute or defend. 2. The extent of any prejudice to the adversary from that failure. 3. Any history of dilatoriness on the part of the recalcitrant party. 4. Whether the attorney's conduct was willful or in bad faith. 5. The adequacy of alternative sanctions. 6. Whether the underlying claim appears to have merit.").

Under Rule 55(c), "[f]or good cause shown the court may set aside an entry of default." Fed. R. Civ. P. 55(c). In deciding whether to set aside an entry of default, the Court should consider the following four factors: (1) whether the plaintiff would be prejudiced by setting aside the default; (2) whether the defendant has a meritorious defense; (3) whether the default resulted from the defendant's own culpable conduct; and (4) whether alternative sanctions would be effective. See Emasco

party has failed to answer or otherwise defend as of a certain date. Once default is entered by the Clerk, judgment by default, meaning that a party is entitled to relief, may be sought from either the Clerk or the court, depending on the certainty of damages and the reason why default was entered. See Federal Practice and Procedure §§ 2683-84.

New Forum Publishers v. Nat'l Org. for Children, Inc., No. Civ.A. 02-1737, 2003 WL 22016941, at *1 (E.D. Pa. July 1, 2003) (Robreno, J.).

Ins. Co. v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987) (setting forth factors to be considered by a court in deciding whether to vacate judgment under Rule 60(b)); Feliciano v. Reliant Tooling Co. Ltd., 691 F.2d 653, 656 (3d Cir. 1982) (noting that the same factors apply whether the court is asked to set aside an entry of default or open a default judgment); Worldwide Assocs., Inc. v. Golden Mark Maintenance Ltd., No. 99-5889, 2000 WL 795894, at *1 n. 2 (E.D. Pa. June 9, 2000).

While all four factors are relevant, the "threshold question is whether the defendant has alleged facts which, if established at trial, would constitute a meritorious defense to the cause of action." Resolution Trust Corp. v. Forrest Grove, Inc., 33 F.3d 284, 288 (3d Cir. 1994) (citation and internal quotation marks omitted). The defendant may not establish a meritorious defense with "simple denials or conclusory statements;" rather, the defendant must assert specific facts supporting its meritorious defense. United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984). To establish a meritorious defense, the defendant must allege sufficient facts which, "if established at trial, would constitute a complete defense to the action." Id.

(C).

In the present case, Wal-Mart contends that its

allegedly infringing product does not infringe plaintiff's patent, either literally or under the doctrine of equivalents. There is no literal infringement, according to Wal-Mart, because the neck pillow sold by Wal-Mart contains none of the functional and structural limitations of the patented device. See Allen Eng'g Corp. v. Bartell Indus., Inc., 299 F.3d 1336, 1345 (Fed. Cir. 2002) (providing standard for determining literal infringement). There is no infringement under the doctrine of equivalents, according to Wal-Mart, because the devices in question do not perform substantially the same function in substantially the same way to obtain the same result. See Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 40 (1997) (providing standard for determining infringement under the doctrine of equivalents when comparing mechanical devices). Therefore, if Wal-Mart proved these facts, it would establish a meritorious defense.

In addition, other relevant factors for determination include the degree of prejudice to the plaintiff, the extent the defendant's culpable conduct caused the delay, and the availability of alternative sanctions. For plaintiff to establish prejudice by Wal-Mart's delay in filing an answer, he must "demonstrate that the delay caused a disadvantage in asserting and establishing a claimed right or defense." In re Mushroom Transp. Co., Inc., 382 F.3d 325, 337 (3d Cir. 2004).

The prejudice suffered by plaintiff by Wal-Mart's brief delay is minimal because of the embryonic stage of this litigation. Second, whether the default resulted from the Wal-Mart's culpable conduct is debatable in light of the confusion surrounding plaintiff's manner of service.⁴ Mr. Cashel, counsel for Wal-Mart, could reasonably have believed that plaintiff improperly served Wal-Mart because plaintiff's certificate of service stated that the complaint was served by First Class Mail, an improper means for service under Fed. R. Civ. P. 4. See Note 1, supra. Mr. Cashel wrote plaintiff on February 4, 2005 to inform plaintiff of the putative defect in plaintiff's service. Plaintiff did not respond to the letter, but instead filed a motion for default judgment on February 11, 2005. In light of the circumstances surrounding the service of process, the Court cannot conclude that Wal-Mart's default was due to its own culpable conduct. Finally, the Court concludes that Wal-Mart acted in a good faith belief that service was defective. Accordingly, no alternative sanctions are necessary.

⁴ At today's hearing, plaintiff offered a letter to him from Sandra L. Boscia, Assistant General Counsel in Wal-Mart's Commercial Litigation Department. (Ex. 1 at today's hearing). Ms. Boscia's letter was sent in response to plaintiff's earlier correspondence claiming that Wal-Mart had infringed his patent. Contrary to what appears to be the plaintiff's understanding of the letter's statement that future "correspondence" be directed to Ms. Boscia's attention, the letter did not constitute a waiver by Wal-Mart of the requirement that service be made in accordance with Federal Rule of Civil Procedure 4 and Pennsylvania Rules of Civil Procedure 403 and 404.

III.

In light of the foregoing analysis and the strong policy in favor a deciding cases on the merits, see Spain v. Gallegos, 26 F.3d 439, 454 (3d Cir. 1994), plaintiff's motion for a default judgment will be denied. Wal-Mart's motion to set aside entry of default will be granted. An appropriate order follows.

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WAL-MART STORES, INC. AND THEIR	:	
MANUFACTURER OF THE PRODUCTS	:	
AND ALL OTHER CO-INFRINGERS,	:	

ORDER

AND NOW this **10th** day of **March, 2005**, upon consideration of plaintiff's Motion for Judgment by Default (doc. no. 3), it is **ORDERED** that the Motion is **DENIED**.

IT IS FURTHER ORDERED that, upon consideration of the Motion of Defendant Wal-mart Stores Inc. to Set Aside the Entry of Default (doc. no. 8), the Motion is **GRANTED**, good cause having been shown.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.